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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

8 BRANDON J. RUBIO,

9 Plaintiff,

10 v.

11 KING COUNTY, *et al.*,

12 Defendants.

Case No. C16-1269-JCC-JPD

ORDER DENYING PLAINTIFF'S
MOTION TO CONSOLIDATE CASES
AND GRANTING CONTINUANCE OF
DEFENDANTS' SUMMARY JUDGMENT
MOTION

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14 This is a civil rights action brought under 42 U.S.C. § 1983. Currently pending before
15 the Court are plaintiff's motion to consolidate cases and issue a new scheduling order (Dkt. 40),
16 plaintiff's multiple motions to extend the pretrial deadlines (Dkts. 30, 31 and 43), and plaintiff's
17 motion for appointment of counsel (Dkt. 42). Also pending are defendants' motion for summary
18 judgment (Dkt. 34), and plaintiff's request to defer or deny the summary judgment motion under
19 Fed. R. Civ. P. 56(d). The Court, having reviewed each of the pending motions, all briefing
20 related to those motions, and the balance of the record, hereby finds and ORDERS as follows:

21 (1) Plaintiff's motion to consolidate cases and issue a new scheduling order (Dkt. 40)
22 is DENIED. Plaintiff, through counsel, seeks to consolidate the instant action with another

23 ORDER DENYING PLAINTIFF'S
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1 pending case, *Rubio v. DeJesus*, C16-1307-JCC-BAT. Plaintiff argues that consolidation is
2 appropriate because the cases were filed within a few days of each other and they involve the
3 same plaintiff, similar allegations of medical mistreatment, similar defendants, and the same
4 counsel for all defendants. (Dkt. 40 at 5.) Defendants oppose plaintiff's motion to consolidate.

5 Pursuant to Fed. R. Civ. P. 42(a), where actions before the court involve "a common
6 question of law or fact" the court may consolidate the actions. This rule affords courts "broad
7 discretion" to consolidate cases pending in the same district either on motion by a party or *sua*
8 *sponte*. *In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987). In deciding whether
9 consolidation is appropriate, the Court considers a number of factors including "judicial
10 economy, whether consolidation would expedite resolution of the case, whether separate cases
11 may yield inconsistent results, and the potential prejudice to a party opposing consolidation."
12 *First Mercury Ins. Co. v. SQI, Inc.*, 2014 WL 496685, at *2 (W.D.Wash. Feb.6, 2014). Having
13 considered these factors, this Court concludes that consolidation is not appropriate in this
14 instance.

15 The operative complaint in this action is plaintiff's amended complaint filed on October
16 3, 2016. (*See* Dkt. 9.) Plaintiff alleges therein that his Eighth Amendment right to be free from
17 cruel and unusual punishment was violated when he contracted MRSA (Methicillin-resistant
18 *Staphylococcus aureus*) after being housed with another inmate who had an active MRSA
19 infection, and when the antibiotics prescribed to treat the infection were confiscated during a
20 routine cell inspection thereby interfering with the directives of medical personnel and
21 exacerbating plaintiff's medical condition. (*Id.* at 2.) The events relating to this claim occurred
22 between approximately March 23, 2016 and April 21, 2016. (*See* Dkt. 45 at 2. *See also*, Dkt. 35

1 at 3-7.) Defendants in this action are King County and King County Corrections Officer Chan.
2 (*See* Dkt. 9 at 2.)

3 The operative complaint in case C16-1307 is plaintiff's amended complaint filed on
4 September 27, 2016. (C16-1307-JCC-BAT, Dkt. 9.) Plaintiff alleged therein that after
5 sustaining an ankle injury during an altercation with other inmates on February 14, 2016, and
6 receiving treatment at Harborview Medical Center, he was denied crutches or a brace upon his
7 return to jail, resulting in pain and permanent damage to the ankle. (*Id.* at 2-3.) Plaintiff also
8 alleged that on July 14, 2016, he was re-injured when King County Corrections Officer Arnel
9 DeJesus zip-tied plaintiff's restraints to his aircast, causing him to trip twice and resulting in a
10 renewed need for crutches. (*Id.* at 3.) Plaintiff's allegations regarding the adequacy of his
11 follow-up care for his ankle injury were dismissed prior to service. (*See id.*, Dkts. 10, 11.) Thus,
12 the only claim remaining in case C16-1307 concerns the conduct of Officer DeJesus.

13 While plaintiff's two cases both relate to his incarceration at the King County Jail in
14 2016, and will require application of similar laws, the cases do not involve the same set of facts
15 or the same parties. *See Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997) (the "mere fact
16 that all Plaintiffs' claims arise under the same general law does not necessarily establish a
17 common question of law or fact"). As noted above, the instant action involves a discrete series
18 of events which transpired over the course of approximately a month in March and April of
19 2016. Case C16-1307 involves, at this juncture, a single incident which occurred in July 2016
20 and concerns the conduct of a single individual, conduct which is wholly unrelated to the
21 conduct underlying plaintiff's claims in this action.

1 Though, as defendants point out, there may have been some efficiency in consolidating
2 parts of the discovery process given that plaintiff's jail medical records would have been
3 discoverable in both cases, it appears that plaintiff's counsel is now in possession of those
4 records and, thus, no additional benefit would be achieved by consolidating the cases at this time.
5 Moreover, the instant action is in a more advanced procedural posture than case C16-1307.
6 While a pretrial scheduling order has yet to be issued in the C16-1307 case, the pretrial deadlines
7 established in this case have passed and a motion for summary judgment is now pending.
8 Consolidation would inevitably result in a lengthy delay of the instant action, and with little
9 resulting benefit.

10 The only apparent advantage to consolidating the two cases would be to allow plaintiff's
11 counsel, who appeared in this action only recently, additional time get up to speed. However, the
12 Court can manage such timing issues within the context of this case and without the significant
13 delays and complications which would result from consolidation. For the foregoing reasons,
14 plaintiff's motion to consolidate the instant action with C16-1307, and to issue a new scheduling
15 order consistent with that case, is denied.

16 (2) Plaintiff's motions for an extension of the pretrial deadlines (Dkts. 30, 31 and 43)
17 are DENIED. Pursuant to Fed. R. Civ. P. 16(b)(4), "[a] schedule may be modified only for good
18 cause and with the judge's consent." The "'good cause' standard primarily considers the
19 diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975
20 F.2d 604, 609 (9th Cir. 1992). Defendants oppose plaintiff's motions, arguing that plaintiff has
21 not demonstrated any diligence or otherwise established good cause for the requested
22 modification of the pretrial deadlines. (*See* Dkt. 32 at 3.)

1 A Pretrial Scheduling Order was issued in this case on December 21, 2016. (Dkt. 22.)
2 That Order established a discovery deadline of March 20, 2017, and a dispositive motion filing
3 deadline of April 20, 2017. (*Id.*) On the same date, the Court issued an Order denying two
4 motions for appointment of counsel which were filed by plaintiff in November 2016. (*See* Dkt.
5 21.) Plaintiff filed a third motion for appointment of counsel in January 2017, which was also
6 denied. (*See* Dkt. 29.) On March 23, 2017, three days after the discovery deadline had passed,
7 the Court received plaintiff's first request for an extension of the pretrial deadlines. (*See* Dkt.
8 30.) A week later, the Court received a second such request. (*See* Dkt. 31.) Plaintiff's third
9 request for an extension of the pretrial deadlines was received on April 10, 2017. (Dkt. 43.)
10 Plaintiff asserts in those motions that a corrections officer employed at the Washington
11 Corrections Center ("WCC") threw away some of his legal materials and interfered with his
12 ability to litigate this action. (*See* Dkt. 30 at 1-2; Dkt. 31, Dkt. 43 at 2.) Plaintiff also claims that
13 the law library at WCC is out-of-date and that the Lexis/Nexis software is not user friendly. (*See*
14 Dkt. 30 at 2.)

15 The question of whether plaintiff diligently pursued his claims prior to counsel appearing
16 on his behalf in April 2017 is the subject of additional briefing relative to plaintiff's request to
17 deny or defer defendants' pending summary judgment motion and will be discussed in more
18 detail below. For purposes of plaintiff's *pro se* motions for modification of the pretrial schedule,
19 it is sufficient to note that based on plaintiff's prior activity in this case, there appears no reason
20 plaintiff could not have submitted a timely request to extend the pretrial deadlines, and it would
21 be patently unfair to defendants to scrap the original pretrial schedule and begin anew at this late
22 date.

1 (3) Plaintiff's fourth motion for appointment of counsel (Dkt. 42) is STRICKEN as
2 moot given that counsel has now appeared on plaintiff's behalf.

3 (4) Plaintiff's request under Fed. R. Civ. P. 56(d) to deny defendants' pending
4 summary judgment motion or to allow plaintiff additional time to conduct discovery (*see* Dkt.
5 47) is GRANTED in part.

6 Under Rule 56(d), when "a nonmovant shows by affidavit or declaration that, for
7 specified reasons, it cannot present facts essential to justify its opposition [to a summary
8 judgment motion] the court may: (1) defer considering the motion or deny it; (2) allow time to
9 obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."
10 Fed. R. Civ. P. 56(d). "The burden is on the party seeking additional discovery to proffer
11 sufficient facts to show that the evidence sought exists, and that it would prevent summary
12 judgment." *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).

13 Plaintiff's counsel acknowledges that no meaningful discovery was conducted in this
14 case prior to April 25, 2017, when counsel for both parties met to discuss the exchange of
15 discovery in this case and in case C16-1307. (Dkt. 47 at 7.) On that date, plaintiff's counsel
16 apparently obtained records relating to plaintiff's medical care at times relevant to his claims in
17 this action and some other, unspecified, discovery. (*Id.*) Plaintiff's counsel asserts that the
18 materials obtained in late April were not uncovered earlier because plaintiff has not had adequate
19 access to justice. (*Id.*) Counsel notes that plaintiff's multiple requests for pro bono counsel were
20 denied. (*Id.*) Counsel further notes that plaintiff has alleged that some of his legal materials
21 related to this case were discarded by a corrections officer at WCC, and that the same officer has
22 attempted to thwart plaintiff's progress in pursuing this case. (*Id.*) Plaintiff's counsel maintains

1 that despite plaintiff's best efforts, he has been unable to litigate this case due to matters outside
2 his control. (Dkt. 47 at 7.)

3 Plaintiff's counsel argues that there are two areas which require additional discovery and
4 depositions, and are essential to opposing defendants' summary judgment motion. Specifically,
5 counsel argues that they expect to elicit, through discovery, evidence showing: (1) that plaintiff
6 was housed with another inmate who had MRSA, and that plaintiff contracted MRSA as a result
7 of their common housing; and, (2) that plaintiff was deprived of his antibiotic medication by
8 defendant Chan and that his MRSA infection worsened as a result of that deprivation. (Dkt. 47
9 at 7-8.)

10 Defendants oppose plaintiff's request for additional time to conduct discovery, arguing
11 that plaintiff has not been diligent in his pursuit of discovery, and that he has not demonstrated
12 that additional time will likely produce the sought after discovery. (Dkt. 49 at 4-5.) Defendants
13 maintain that the request for more time is based on speculation that plaintiff will obtain
14 discovery that is favorable to him, rather than a reasonable pursuit of readily available
15 information. (*Id.*) Defendants go on to explain in some detail why they believe it unlikely that
16 additional time will produce the discovery plaintiff claims to be seeking. (*See id.* at 5-9.)

17 The record confirms that plaintiff, while proceeding *pro se*, was not diligent in pursuing
18 discovery. Plaintiff initiated this action in August 2016, and the Court issued its Pretrial
19 Scheduling Order in December 2016. In the many months that this action has been pending,
20 plaintiff has made no effort to initiate any discovery. Plaintiff has, however, managed to file
21 multiple motions with the Court, despite the alleged interference of corrections officials, and he
22 appears to concede he has had access to a law library, albeit one which he deems deficient.

1 While plaintiff's counsel correctly points out that plaintiff's multiple motions for appointment of
2 counsel were denied, the simple fact is that plaintiff made no showing that such an appointment
3 was appropriate. The Court is not persuaded that plaintiff has been denied access to justice nor is
4 the Court persuaded that plaintiff, through the exercise of reasonable diligence, could not have at
5 least begun the discovery process prior to the appearance of counsel in April 2017.

6 The Court is nonetheless cognizant that regardless of how diligent plaintiff was or was
7 not in his pursuit of discovery, counsel no doubt has a better grasp of what type of discovery is
8 necessary in this action and how best to obtain it. The Court is also cognizant that defendants
9 have litigated this action diligently and now face potential delays to resolution of this case, as
10 well as additional expense related to extended discovery, if the Court grants plaintiff the
11 requested continuance of defendants' summary judgment motion.

12 Based on the materials currently in the record, it would be a reasonable exercise of this
13 Court's discretion to deny plaintiff's request for a continuance as the Court is not as optimistic as
14 plaintiff's counsel that additional discovery will be fruitful in opposing defendants' summary
15 judgment motion. However, the Court is reluctant to proceed to resolution of the pending
16 summary judgment motion without giving plaintiff's counsel at least some opportunity to
17 conduct discovery related to that motion. Accordingly, plaintiff is granted until ***Friday, June 30,***
18 ***2017*** to conduct additional discovery in this matter, but such discovery shall be limited to matters
19 necessary to oppose defendants' summary judgment motion.

20 (5) Defendants' motion for summary judgment (Dkt. 34) is RE-NOTED for
21 consideration on ***July 28, 2017***.

(6) The Clerk is directed to send copies of this Order to all counsel of record and to the Honorable John C. Coughenour.

DATED this 17th day of May, 2017.

James P. Donohue
 JAMES P. DONOHUE
 Chief United States Magistrate Judge